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# Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US

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RESEARCH ARTICLE

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## ABSTRACT

Today, there is a growing fear of resurfacing protectionism, from United States' trade-war with China, to UK's Brexit, to the less known trade-restricting measures adopted by countries globally. The General Agreement on Trade & Tariff (GATT), superseded by the World Trade Organisation (WTO) since 1995, rendered the classic forms of protectionism such as tariffs obsolete. However, it did not defeat protectionism; instead, protectionism has evolved through its protean capacity to adapt into new and often undetectable forms, now labelled as 'murky' protectionism (e.g. competition law enforcement and the recent bailout packages). It is argued that there are two ways in which States can utilise competition law to impair free-trade and restrict foreign firms' access to domestic markets: the exemption of certain anticompetitive conduct under national competition law and the strategic application of domestic competition law. This article considers competition law as an instrument of protectionist policy with comparative analysis of the US and the European Union. Using an international political economy (IPE) perspective underpinned by overlapping theories of (legal/political) realism, this article establishes that, while no direct robust empirical evidence of protectionist motivations on competition law enforcement exists, particularly on 'merger regulation and export cartel exemptions', the presence of political elements on the decision-making, the wide discretion granted to competition authorities and the 'sponge' nature of competition law present an opportunity for the use of competition law for protectionist tendencies.

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## KEYWORDS:

International Competition Law; Interdisciplinary Approach; International Economic Law; Protectionist Policy; Merger Regulation; Export Cartel; Legal/Political Realism; International Political Economy

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## SECTION 1: INTRODUCTION

Today, there is a growing fear of rising protectionism, from the United States (US) under the Trump administration's imposition of tariffs and a trade war with China, to the United Kingdom's Brexit, to the less known trade-restricting measures adopted by other countries all over the world.<sup>1</sup>

The neoclassical economic model suggests the desirability of free trade over protectionism because free trade lowers prices, allows a flow of goods with little restrictions and improves the quality of products, resulting in overall welfare gain.<sup>2</sup> On the other hand, protectionism results in welfare losses, increased prices and a decline in innovation, thus harming consumers and economic efficiency.<sup>3</sup>

The natural inclination of states to engage in protectionism is as old as time and, until today, has never been diminished.<sup>4</sup> The General Agreement on Trade & Tariff (GATT),<sup>5</sup> superseded by World Trade Organisation (WTO) since 1995, rendered the classical forms of protectionism such as tariffs obsolete. However, it did not defeat protectionism; instead, protectionism has evolved through its protean capacity to adapt into new and often undetectable forms,<sup>6</sup> now labelled as 'murky' protectionism.<sup>7</sup>

Competition law enforcement is suspected as one of the forms of this murky protectionism. There are two ways (among others) considered in this article in which States can utilise competition law to impair free trade and restrict access of foreign firms to domestic market. First is the exemption under national competition law such as export cartel exemptions; second is the strategic application of domestic competition law, e.g. alleged discriminatory and selective enforcement of merger regulation.<sup>8</sup>

It appears that States use their competition law as invincible trade barriers to further their protectionist bids such as national security and environmental protection.<sup>9</sup> In recent years, States have been accused of using their competition law to pursue protectionism. For instance, the US has criticised the EU's merger regulation as protecting competitors and not competition, particularly in the technology industry in mergers involving non-EU firms – even when those same acquisitions are approved by other competition authorities. A good example is the Commission's 2001 decision to block the \$42 billion acquisition of Honeywell by General Electric.<sup>10</sup> Similarly, the US is being encouraged to change their stance on leniency towards export cartels due to its beggar-thy-neighbour effect.<sup>11</sup> Investigating the controversy around the use of competition law for protectionist ends is particularly relevant today to protect and uphold free trade and liberalisation. There is a gap between competition and trade policies which national competition law fails to address and the WTO rules fail to

regulate. Merger regulation and export cartel exemptions appear to be used as tools for protectionist ends to exploit the gap. This article, therefore, examines whether States use their competition law to pursue protectionist policy in the EU and the US. In this context, the article specifically focuses on analysing how merger regulation and treatment of export cartel further protectionism.<sup>12</sup>

In terms of method and approach, the article uses the international political economy (IPE) perspective underpinned by (legal/political) realism and interdisciplinary, theoretical-analytical perspectives within the framework of international competition law. It employs (comparative) qualitative empirical evidence from the EU and US for comparative analysis. The international political economic perspective is used to analyse how the presence of political elements and influences on decision-making reflect the enforcing jurisdiction's national environment, culture, priorities and goals by presenting an opportunity for the use of competition law for protectionist bids. Meanwhile, the interdisciplinary and theoretical-analytical perspective is used to employ literature in the legal, economics, international relations and international politics areas.<sup>13</sup> This is empirically analysed within the framework of (international) competition law. The (comparative) qualitative empirical evidence is employed by gathering relevant material from the European Union and the United States of America for an in-depth analysis.

The article adopts legal/political realism theory in the analysis section to demonstrate that the regulation of competition law by regulators/competition authorities in the EU (mainly, the EU Commission)<sup>14</sup> and in the USA (the US Department of Justice and the Federal Trade Commission)<sup>15</sup> is highly influenced by the public policy of the nation. In simple parlance, legal realism is a theory that all law derives from prevailing social interests and public policy. According to legal realist theory, judges consider not only abstract rules, but also social interest and public policy, when deciding a case.<sup>16</sup> Legal realism is a diverse school of thought and any attempt to homogenise it will distort more than simplify,<sup>17</sup> since its influence goes beyond being a mere theory of adjudication.<sup>18</sup> Judges more often than not promote social ends; just as Cardozo admitted, a judge may be tempted to substitute their view for that of the community.<sup>19</sup> From this perspective, the legal realist is attached to social reform and they want law to serve as an instrument for social action. To achieve this, realist thought, policy objectives and interrelationship between legal rules had to become more intimate.<sup>20</sup>

Political realism is a theory that attempts to explain, model, and prescribe political relations. It proposes that power is (or ought to be) the primary end of political action, whether in the domestic realm or international arena. In the domestic realm, the theory contends that politicians do, or should, strive to maximise their power,

whilst in the international arena, nation States are the primary agents that maximise, or ought to maximise, their power. In the context of nation States, the proposition is that a nation can only advance its interests against the interests of other nations; this implies that the international environment is inherently unstable.<sup>21</sup> Realism emphasizes power and the national interest and directs more attention to political security than to economic issues.<sup>22</sup> Realism is equated to, if not related to, mercantilism, also known as protectionism.<sup>23</sup> To obtain political security, realists enrich their power and wealth at the expense of their neighbouring States, often through an increase in exports and decrease in imports.<sup>24</sup> IPE is concerned with the interaction of economics and politics in the international sphere.<sup>25</sup> Politics is represented by the State as a sovereign political unit and economics is represented by the market as a system of production and consumption at a price determined by supply and demand.<sup>26</sup>

Based on the political and economic dimensions involved in the interplay of competition law and trade policy, particularly protectionism, it is the position of this article that realist theory, along with an IPE perspective, is relevant in understanding why nation States use competition law as a protectionist bid in their trade policy.

The article is structured into five broad sections; this section, Section 1 is the general introduction and set out the method, including the theoretical approach used in the article. Section 2 provides a brief conceptual understanding of the relevant concepts in the article which have divergent conceptual interpretations within academic literature. Section 3 discusses the relationship between competition law and other issues areas such as trade policy, protectionism and others. Section 4 analyses competition law and protectionism in the two case studies, EU and US, by using specific competition law instruments: (i) merger regulation and (ii) treatment of export cartels to investigate and analyse how they are used for protectionism, including a brief comparative analysis. Finally, Section 5 summarises and concludes the article.

## SECTION 2: A CONCEPTUAL UNDERSTANDING OF RELEVANT CONCEPTS

Looking at academic literature, scholars have provided divergent conceptual views or interpretations of relevant competition law concepts that appear in the article.

### (I) COMPETITION

Competition, in its broad economic sense, is the process whereby firms struggle to win against each other. Competition law, also known as antitrust in the United

States, refers to the legal rules and standards which aim to protect the process of competition by dealing with market imperfections and restoring desirable competitive conditions in the market.<sup>27</sup> Competition policy, on the other hand, is broader than competition law and covers the full range of government measures that could promote competitive market structures and behaviour, including trade liberalisation measures.<sup>28</sup> Views on the necessity of the enactment of competition law to implement competition policy remain divided.<sup>29</sup> The neo-classical economics case for competition argues competition provides various benefits such as lower prices, efficiency, and innovation.<sup>30</sup> There is no consensus on the goals of competition law. Some scholars suggest that competition law is akin to a sponge or that it is a fluid concept influenced by varying objectives, policies, culture; hence, the goals vary based on each enacting jurisdiction.<sup>31</sup> On the other hand, one of the prominent scholars of the Chicago school of competition analysis suggests that the ultimate goal of competition law is economic efficiency, which is equated to consumer welfare maximisation.<sup>32</sup> Nonetheless, the most commonly declared goal of competition law is to protect and encourage competition to achieve the optimal resource allocation and maximise consumer welfare.<sup>33</sup>

As a result of these diverging goals and enforcement policies of competition law, several scholars proposed for the internalisation, or at least harmonisation, of competition law.<sup>34</sup> Some scholars such as Fox and Manne and Weinberger, recognising the restrictive effect on trade by anticompetitive practices, called for the alignment of competition law within the WTO Framework. However, this failed to materialise as a result of the diverging views of the member States.<sup>35</sup>

### (II) MERGER

Under a business or firm perspective, mergers<sup>36</sup> are motivated by efficiency goals as explained by efficiency theory, strategy to increase market power as explained by market power hypothesis, or simply the managers' greed or overconfidence as explained by the hubris hypothesis.<sup>37</sup> Efficiency theory suggests that firms will merge if there is a potential to generate sufficient realisable synergies beneficial to all the merging parties.<sup>38</sup> Synergies comprise of collusive, operational and financial synergy.<sup>39</sup> Operational synergies are manifested in resulting economies of scale and economies of scope as they mainly relate to production and/or administrative efficiencies; financial synergy refers to cost savings, and collusive synergy refers to expansion of market power as supported by the market power hypothesis.<sup>40</sup> Alternatively, hubris hypothesis argues that decisions to merge are the result of managements' overestimation of the resulting benefits to the business due to the managers' overconfidence in decision-making.<sup>41</sup> Nonetheless, each merger transaction is unique; hence, there is no single

theory that encapsulates the motivations for pursuing these transactions.<sup>42</sup>

Under the legal perspective, however, a merger simply refers to a combination of two or more corporations into a single entity, regardless of business reason or mode of acquisition.<sup>43</sup> For competition authorities, mergers pose a concern because of the merging firms' potential to accumulate or expand market power, which can distort competition through monopoly or abuse of dominance.<sup>44</sup>

However, empirical analyses negate the protectionism hypothesis, at least with the perspective of the EU competition law. Initial studies found a positive correlation between the likelihood of opposition to mergers involving foreigners and the foreseen negative impact of the merger on domestic competitors.<sup>45</sup> Yet, after the 2004 reforms introduced EU merger regulation, a re-examination of the protectionist hypothesis showed a shift in the protectionist tendencies of the enforcement authority.<sup>46</sup> Recent research affirmed the results of this re-examination and found that the EU Commission committed no discrimination in its enforcement of merger regulation, whether in frequency or intensity, in mergers involving foreign firms.<sup>47</sup> These empirical analyses, at least in the EU context, show that competition authorities did not use their merger control power to intervene on mergers involving non-EU or US acquirers. Nevertheless, they fail to conclusively prove that protectionism with merger regulation does not exist. Conversely, qualitative analyses examining merger decisions and the text of the merger regulations claim that merger regulation is used, or at least could potentially be used, for protectionist purposes such as promotion of national champions.<sup>48</sup>

### (III) EXPORT CARTELS

A cartel is an association of rivals agreeing to fix prices above the competitive level, limit output below the competitive level or allocate markets between or amongst themselves in order to maximise their profits.<sup>49</sup> Cartels, generally, have been labelled as the 'supreme evil of antitrust'<sup>50</sup> and the 'primary evil of global trade'.<sup>51</sup> On the other hand, export cartels are cartels that only operate in foreign markets and do not directly affect the markets in the jurisdiction where the cartel members are located.<sup>52</sup> While there is a consensus among the world's competition authorities to prohibit hard-core cartels,<sup>53</sup> there is lack of clarity and transparency surrounding the treatment of export cartels. It is argued that export cartels receive considerable political support,<sup>54</sup> not only because of its benefits to the exporting country, but also because it is argued that export cartels are not necessarily pure evil like hard-core cartels.<sup>55</sup> Export cartels may have the same goals as hard-core cartels – to fix prices or allocate markets – but they may also have strictly efficiency-enhancing goals such as sharing marketing and transportation costs.<sup>56</sup>

According to economic theory, export cartels raise domestic producer welfare without diminishing domestic consumer welfare.<sup>57</sup> Additional export revenues and increases in national welfare incentivises exporting States to tolerate, if not promote, export cartels.<sup>58</sup> Furthermore, since the adverse effects of export cartels are externalised or felt exclusively by importing States, exporting States possessing the territorial jurisdiction over the cartel have very little interest in disciplining the conduct.<sup>59</sup> On the other hand, importing States which have the motivation to prevent the conduct due to its anticompetitive effect and corresponding reduction in their consumer welfare do not have the territorial jurisdiction and must rather apply their competition laws extra-territorially to sanction the cartel.<sup>60</sup> However, since exporting States are not motivated to sanction the cartel, or even induced to promote or tolerate the cartel because of its positive domestic effect, they may block any extraterritorial enforcement by the importing States through exemptions or non-cooperation.<sup>61</sup> This conflicting interest presents a competition law enforcement dilemma on export cartels.

Fox similarly observed the insufficiency of national competition enforcement to regulate export cartels because it lacks legitimacy or capacity to reach competitive restraints on foreign soil; nonetheless, it mainly affects the domestic home market.<sup>62</sup> Export cartels are often not covered by national competition laws when they do not affect the domestic market, neither directly or indirectly. Scholars argue that export cartels, to the extent that they are tolerated – if not encouraged – by the exporting States, are an effort of exporting States to boost domestic welfare at the expense of global welfare. More specifically, it is at the cost of the consumers' welfare in the target market – a clear manifestation of a beggar-thy-neighbour conduct.<sup>63</sup> On the contrary, there is a belief that the scarcity of empirical data on export cartels handicaps the attempts to analyse the issue on export cartels.<sup>64</sup> The lack of data creates difficulties to determine the gravity of the anticompetitive harm that export cartels create; thus, the very assumptions on which the theory of the nexus of export cartel and anticompetitive conduct rely may be misguided.<sup>65</sup>

### (IV) TRADE POLICIES

Like competition law, trade policy also contains both political and economic dimensions. It refers to the system of incentives put in place by a State with regard to production and consumption, including importation, exportation and trade of goods and services as aligned with the imposing state's growth and development objectives.<sup>66</sup> Trade policy involves various actions and tools such as the imposition of tariffs, quotas or restrictions, granting of subsidies to domestic industries and other measures often classified into two broad types: tariffs and non-tariff measures.<sup>67</sup>

The tariff is the classic instrument of trade policy.<sup>68</sup> Tariffs are imposed to generate revenue but also, more importantly, to protect the domestic industry of the imposing country.<sup>69</sup> However, with increasing trade liberalisation, most states covertly seek to protect domestic sectors through other instruments of trade policy such as non-tariff measures.<sup>70</sup> Non-tariff measures include quotas, licences, technical barriers to trade, sanitary and phytosanitary measures, export restrictions, custom surcharges, financial measures and anti-dumping measures.<sup>71</sup> Whilst non-tariff measures may intrinsically be protectionist, they seem useful in addressing failures in the market such as externalities and the asymmetry of information between producers and consumers.<sup>72</sup>

Trade policy is historically determined on the basis of the macro and micro view.<sup>73</sup> The micro view provides that the State adopts its trade policy in accordance with the preferences of its industrial constituents.<sup>74</sup> Hence, under the micro view, trade policy refers to the 'aggregate outcome of industry battles over protection.'<sup>75</sup> The macro view, on the other hand, suggests that the trade policy of the State cannot simply be traced back to the preferences of its industrial constituents.<sup>76</sup> Under the macro view, the trade policy of the State reflects the collective interest of the State and the State acts as an independent agent furthering the national State objectives. Trade policy in all countries consists of varying dimensions or levels. For example, the EU trade policy, in addition to its 'unilateral' liberalization, i.e. voluntarily providing preferential market access or zero tariffs for specific types of countries, also adopts bilateral, plurilateral and multilateral agreements as well as commercial instruments such as anti-dumping laws and other safeguards.<sup>77</sup> The objectives pursued at each level of trade policy constantly changes.<sup>78</sup> Different States negotiate in order to determine their international trade policies.<sup>79</sup> Hence, bilateral, plurilateral or multilateral trade agreements are born, usually involving preferential tariff rates, agreements on investments, technology-sharing or single market objectives.<sup>80</sup> In the context of protectionism, the ability of States to resolve trade disputes amongst themselves significantly influences protectionist positions.<sup>81</sup> However, it is argued that protectionist trade policy is more than just a means of adjudicating trade disputes; rather, protectionism is pursued by certain States in order to further their national economic and political policies.<sup>82</sup>

## PART II PROTECTIONISM

Protectionism is a kind of trade policy aimed at impeding foreign trade access to the domestic market and preserving, if not improving, the position of domestic producers in contrast to foreign producers.<sup>83</sup> With the decline of classic protectionism, i.e. the imposition of

tariffs and other visible barriers to trade, comes the rise of 'murky' protectionism, also known as new protectionism, which is characterised by seemingly innocuous and subtle measures designed to distort free trade without constituting as violations of the WTO rules or trade agreements.<sup>84</sup> More aptly, murky protectionism has been defined as 'abuses of legitimate discretion which are used to discriminate against foreign goods, companies, workers and investors'.<sup>85</sup> Examples of murky protectionism are the imposition of regulatory and licensing requirements, tightening of product standards, limitation of ports of entry, introduction of bailout packages and initiation of disguised 'green' protectionism.<sup>86</sup>

Academic literature provides conflicting arguments regarding protectionism. Economic theory under the classic utility model establishes that any benefit that may result from protectionism is outweighed by its costs in terms of losses to consumer welfare and decline of economic growth.<sup>87</sup> Another argument against protectionism is the moral argument which provides that protectionism is akin to stealing, i.e. producers and rent-seeking individuals induce the government to pursue their interests and benefit at the expense of consumers, in effect taking away what is due.<sup>88</sup> On the other hand, the most notable arguments in favour of protectionism are national defence, infant industry and strategic trade theory.<sup>89</sup>

The national defence argument authorises the protection of industries with a vital role in national security such as weapon manufacturing to ensure the States' readiness in times of war or adversity.<sup>90</sup> It is suggested that agricultural protectionism is subsumed under the national defence argument because food security and food availability are part of the States' legitimate national interests.<sup>91</sup> It has been noted that the EU's agricultural protectionism resulted in growth of production, achievement of self-sufficiency in food security and stability in the common market for agricultural products.<sup>92</sup>

The infant industry argument provides that a State, in order to grow, must first strengthen its newly established industries which do not enjoy the cost and production efficiencies yet compared to its competitors; this is at least until it establishes its comparative advantage and the playing field has been levelled.<sup>93</sup> Proponents for the protection of the infant industry assert that protection must only be temporary and the benefits provided by the protected industry must exceed the costs of protection, also known as the Mill-Bastable Test.<sup>94</sup>

The strategic trade theory, introduced by James Brander and Barbara Spencer, has also been used to support protectionism.<sup>95</sup> According to the strategic trade theory, firms are inclined to take 'strategic' moves exhibiting aggressive behaviour; the State's support of such national firms will further give more credence to such behaviour, in effect deterring potential rivals such



as foreign firms.<sup>96</sup> Hence, strategic trade theory suggests the States can raise their national income at the expense of other States by supporting or promoting national firms in international competition.<sup>97</sup>

### SECTION 3: THE RELATIONSHIP BETWEEN COMPETITION LAW AND OTHER ISSUE AREAS

#### (I) COMPETITION AND TRADE POLICIES

Competition and trade policies are both national policies used as tools for economic development, albeit with different objectives, principles, and scope. No consensus on the overall relationship between the two has yet been reached. It is suggested that the two policies could be mutually reinforcing, complementary, contradictory, or substitutes depending on how they are applied.<sup>98</sup> Based on their basic objectives, efficiency and consumer welfare, competition and trade policies are perceived as mutually reinforcing.<sup>99</sup> On the other hand, by dealing with private, anticompetitive conduct to ensure effective market access, competition policy is viewed as complementary with trade policy which is concerned with the removal of governmental actions. This facilitates the anti-competitive behaviour by private entities. Restrictive trade measures limit competition by curtailing the entry of foreign suppliers in the market as well as aiding anti-competitive practices by domestic firms; meanwhile, exclusions and exemptions from competition law, as well as lack of enforcement thereof, negatively impact trade.<sup>100</sup>

A contradictory relationship between competition and trade policy is also suggested as a result of their divergent aims and effects. Competition policy is concerned with consumer welfare, while trade policy is focused on the welfare of producers and is more easily influenced by special interest groups.<sup>101</sup> Trade policy also has objectives which conflict with competition policy aims such as raising revenue, promoting self-sufficiency and supporting exports.<sup>102</sup> Finally, competition policy and trade policy are also viewed as substitutes in some respects. For instance, the WTO found that competition law provisions relating to price discrimination serve as a substitute for anti-dumping measures in some circumstances.<sup>103</sup>

The impact of anti-competitive business practices on international trade is the most important concern in trade policy.<sup>104</sup> Experts<sup>105</sup> recognise that anti-competitive practices of firms, in addition to trade barriers, hamper international trade. Hence, the necessity to integrate or at least align competition and trade policies has been formally recognised as early as the proposal for the establishment of the International Trade Organisation (Havana Charter). The Havana Charter contained provisions which encourage member States to prohibit

business practices that affect international trade which restrain competition, limit access to markets, or foster monopolistic control whenever such practices are harmful to trade.<sup>106</sup> Nonetheless, the Havana Charter was not ratified and was instead succeeded by the GATT of 1947, which salvaged some of the provisions from the Havana Charter. Thus, the negotiating parties that created the GATT of 1947 had shown a public awareness that arrangements designed to foster trade could be undermined when commercial enterprises engaged in cartels or other restrictive business practices, and these negotiating parties had proposed treaty provisions to ensure that competition policy would reinforce government measures for international trade.<sup>107</sup> Subsequently, the World Trade Organisation was established in 1995 to succeed the GATT of 1947. Efforts to include competition policy within the trade policy framework in the WTO have proved particularly challenging due to lack of agreement among member States on competition policy.<sup>108</sup> Support for international discipline regarding competition law was originally stimulated by US perceptions that international cartels and the absence or lack of enforcement of national competition law obstructed the ability of US firms to contest markets.<sup>109</sup> The US supported the inclusion of a chapter dealing with restrictive business practices, reflecting its views against German cartels and Japanese *zaibatsu* who are the main opposition to including competition law in the WTO.<sup>110</sup> In recent times, the EU has been in the lead, arguing that all WTO members must adopt and enforce competition laws. Developing countries have not been at the center of the debate on trade and competition in the WTO.<sup>111</sup> However, competition policy has an important role in developing countries, both in promoting a competitive environment and in building and sustaining public support for a pro-competitive policy stance. However, the issue is that many do not have competition laws; those that do often have limited implementation ability.<sup>112</sup> The bottom line of the debate is that any agreement on international competition policy that goes beyond general procedural cooperation and introduction of transparency mechanisms likely must be plurilateral, at least initially.

The lack of consensus on the nexus of competition and trade policy creates a gap which is exploited in order to pursue various motives such as promoting industrial policy, protectionism or nationalism.

#### (II) COMPETITION LAW AND PROTECTIONISM

In the United States, some scholars claim that antitrust law is rooted in protectionist institutions.<sup>113</sup> Evidence reveals that the political impetus for antitrust law originated from lobbying farmers of several agricultural states;<sup>114</sup> however, the majority views of scholars differs on this.<sup>115</sup> Inefficient businesses misused antitrust laws by suing their efficient competitors for lower prices, increase

in output and product or process innovation<sup>116</sup> Today, the use of antitrust law for protectionism is no longer limited to the protection of an industry from another within the domestic sphere; it extends to the international level and transcends international trade. Similarly, in the European Union, remnants of industrial policy abound in the EC competition law.<sup>117</sup> The European Commission has been attacked on the ground of ‘disguised protectionism’, protecting EU-based competitors and furthering the single market objective rather than seeking to uphold competition in strict terms.<sup>118</sup> This is clearly demonstrated in the proposed *Siemens-Alstom* merger. In prohibiting the proposed consolidation of *Siemens and Alstom*, the European Commission unleashed a turmoil of political discontent; arguably, this is more the manifestation of longstanding frustration with certain underlying asymmetries within merger regulation which impede the ascendancy of the European industry on the world stage than an issue with the Commission’s decision itself.<sup>119</sup>

Competition law, as a political creation, is inherently susceptible to ‘instrumentalisation’ for protectionist ends. Competition law is at risk of being misused to advance industrial policies, political agendas and protectionist policies in the guise of competition enforcement, thus bypassing the scrutiny of international trade agreements.<sup>120</sup> The existing legislative framework of competition law enhances this risk, as it provides for greater discretion in decision making and political involvement in the enforcement of competition law.<sup>121</sup> While open-ended discretionary standards are laudable because economic analysis cannot be put into rigid standards as each competition case is unique, it also creates opportunities for abuse. Discretion may be abused to allow regulators to pursue their own private interests, shirk unpleasant duties, augment their regulatory authority in hopes of increasing monopoly rents which they can trade to interest groups in return for personal benefits, and act in other ways that are contrary to the public good.<sup>122</sup> In the context of merger law, for instance, discretion may incentivise regulators to pursue protectionism – in particular, new protectionism. Trade agreements and institutions such as the WTO have made traditional protectionism through open trade discrimination challenging. Yet, the underlying political dynamic driving protectionism has not gone away. Hence, while jurisdictions do not forbid certain mergers, they can still discriminate against them. For instance, regulators can require more onerous ‘fixes’ for mergers that threaten local producers such as requiring the merging parties to divest assets in a way that benefits the domestic competitor.<sup>123</sup>

Indeed, the argument that competition law may be a tool to pursue a protectionist end is commonly premised upon the possibility that competition law – especially through selective, discriminatory enforcement – might actually be abused as a trade barrier.<sup>124</sup> National

protectionism is often demanded by certain industries or interest groups.<sup>125</sup> However, a competition regime that favours domestic firms such as local producers hurt not only the producers and consumers of other countries, but also the domestic consumers.

### (III) MERGER REGULATION AND PROTECTIONISM

One area of competition law that has always been suspected as an instrument of protectionism is merger regulation; the failed merger of *Siemens-Alstom* is a good case in point. Merger regulation is one of the pillars of competition policy aimed at preserving market competition in the event of business combinations and takeovers.<sup>126</sup> However, preservation of competition is not the only rationale for the enforcement of merger regulations; national security, businesses perceived to be of national strategic importance, technological capabilities, jobs and export also influence merger control enforcement.<sup>127</sup> Thus, the protectionism hypothesis posits that merger regulation is used as a tool to protect domestic firms from competition.<sup>128</sup> In addition to protection of domestic firms, which is often associated with the infant industry argument, States are also suspected of using merger regulations to promote its national champions on the premise of strategic trade theory. In the context of merger control, the notion of a national champion generally means that the government encourages or does not prevent a merger between two domestic firms to create a more powerful entity, or it opposes the acquisition of one of the domestic firms by a foreign company.<sup>129</sup>

A study has found that, while merger regulation has deterred anticompetitive mergers, it has also protected rival producers from increased competition due to efficient mergers.<sup>130</sup> In the context of EU merger policy, an empirical analysis to prove the protectionist hypothesis concluded a direct correlation between the likelihood of opposition to the merger by the competition authority when the bidder is a foreign national and the expected adverse effect of the reviewed merger on domestic competitors.<sup>131</sup> After reforms on the EU Merger Regulation were introduced in 2004, the hypothesis was re-examined and change in protectionist tendencies were discovered.<sup>132</sup> The result was more consistent with a recent empirical study that showed the Commission has not intervened more frequently or extensively in transactions involving a non-EU- or US-based firm’s acquisition of a European target.<sup>133</sup> Nonetheless, there has been no conclusive findings on the absence of protectionism. At most, empirical analyses have shifted the burden of proof to those advancing the view.

Despite these empirical results disproving the use of merger regulation for protectionist purposes, persistent allegations abound. The political model of antitrust established that merger decisions are influenced by political contributions of lobby groups representing



special interests, political pressures and social welfare considerations.<sup>134</sup> For instance, Bu argues that the decision of Chinese competition authority to block the merger between *Coca Cola* and *Huiyuan* illustrates the influence of non-competition considerations such as protectionism on merger regulation enforcement.<sup>135</sup> The lack of sufficient analysis as well as broad conclusions reached on the decision left no other conclusion but that China was trying to protect its home-grown, local company from potential brand dilution once absorbed by *Coca Cola*.<sup>136</sup> Another example is the opposition of the US to the potential merger between *Broadcom*, a Singapore-based company, and *Qualcomm*, an American telecommunication chip manufacturer, on the grounds of national security.<sup>137</sup> In the EU, its opposition to the *Boeing/McDonnell Douglas* merger was suspected to arise from protectionist sentiment because of the merger's adverse impact on the rival EU firm Airbus.<sup>138</sup>

#### (IV) EXPORT CARTELS EXEMPTION AND PROTECTIONISM

Export cartel exemptions are instruments of competition policy for trade policy ends.<sup>139</sup> By tolerating, if not supporting, anticompetitive conduct just because it does not affect the domestic market, exporting states in effect assist or condone the harm caused to the importing states.<sup>140</sup> Hence, export cartel exemptions are perceived as tools for protectionism in this context of the beggar-thy-neighbour approach.

In the context of trade policy, export cartel exemptions produce the same economic effect as export subsidies or aids.<sup>141</sup> While both harm competition at the expense of foreign markets and foreign competitors, only export subsidies are regulated under the WTO rules.<sup>142</sup> However, State-run export cartel are challengeable under WTO rules with different outcomes depending on the State.<sup>143</sup> Hence, the difficulty in prosecuting export cartels that have anti-competitive effects is considered a trade dilemma. In Argentina, based on Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,<sup>144</sup> the WTO Panel noted that the WTO rules do not obligate its members 'to assume a full "due diligence" burden to investigate and prevent cartels from functioning as private export restrictions'.<sup>145</sup>

The United States, through the Webb-Pomerene Act of 1918,<sup>146</sup> explicitly exempted export cartels and export association from the Sherman Act<sup>147</sup> and from Section 7 of the Clayton Act,<sup>148</sup> which has been reinforced by the Export Trading Company Act of 1982<sup>149</sup> and the Foreign Trade Antitrust Improvements Act<sup>150</sup> which regulated export cartels by granting them certificates. The EU, on the other hand, while it does not explicitly exempt export cartels, Articles 101 and 102 of the TFEU<sup>151</sup> provide for the limited application of the EU competition law to conduct that produces anticompetitive effects (objective

or subjective) within the internal market and to the trade between Member States. Hence, the EU competition law implicitly allows export cartels if they do not influence the EU internal market.

Strategic trade theory is often used to explain the States' support for export cartels.<sup>152</sup> Exporting States, by supporting their domestic firms engaged in export cartels, increase their national income through export revenues and promote producers' (exporters') welfare at the expense of the importing States. Under the strategic trade theory, exporting States will oppose any of the extraterritorial enforcement of competition law by the importing State, which curtails the export cartels.<sup>153</sup> Just as blocking statutes show the applicability of domestic competition laws to anticompetitive acts and measures of State and State-owned firms internally. This is evidenced by the (Blocking) Order which hinders foreign investigations and enforcement of foreign decisions and judgments against Russian strategic enterprises.<sup>154</sup> In addition, non-cooperation with the importing State's investigation may also be due to the lack of incentive for an exporting State to immediately discipline the export cartel since it does not have any adverse effect on the domestic economy.<sup>155</sup> Not only current trade laws but also national competition laws are insufficient to address the problem of anticompetitive conduct in foreign States which is prejudicial to the target State; this results from the fundamental differences between competition policy and trade policy.<sup>156</sup>

## SECTION 4: ANALYSIS: THE EU AND US

The preceding sections discussed various connections or relationships, including between competition law and protectionism, particularly the use of merger regulation and export cartels as tools to pursue protectionist policies. While conclusions on the relationship between competition and protectionism were drawn from circumstantial evidence rather than direct, the risk of the use of competition law for protectionist ends is undeniably high. Another key takeaway is that discretionary decision-making combined with the political element in competition law enforcement allows jurisdictions to tailor their competition law to fit their industrial policies such as nationalism and protectionism.

It is also noted that there are two ways in which merger regulation can be used as a tool for protectionism. The first is through the law itself. The law governing merger regulation may expressly provide for protection or promotion of certain domestic industries or firms. The second is through the enforcement of merger regulation. Enforcement is influenced by the underlying protectionist policy pursued by the State or political involvement and discretionary bias of the enforcing authority. Between

the two, the second mode is the most common because no jurisdiction will willingly and explicitly recognise the promotion or protection of national champions as a specific goal of competition law;<sup>157</sup> hence, merger control policy is often referred to as 'disguised protectionism'. This section will focus on analysing how merger regulation and export cartels are used to pursue protectionist policies in the EU and US.

#### 4.1 THE EU ANALYSIS

##### (i) *Competition law and protectionist policy:*

##### *analysing merger regulation from an EU perspective*

At first glance, there is nothing in the EU Merger Regulation (EUMR)<sup>158</sup> which indicates that the objective of merger regulation is to pursue protectionism, nor to explicitly promote or protect national champions, certain industries, or domestic firms. The EUMR requires the Commission to be notified in advance of all mergers which have a community dimension.<sup>159</sup> The (EUMR) whereas clause provides that the EU Merger Regulation is grounded on the principles enshrined in Articles 3(1) (g) and 4 of the EC Treaty, which provides for undistorted competition in the internal market and conduct under the principle of an open market economy with free competition. The EUMR explicitly highlights that it is in line with the policy of open market and free competition. Taken together with open pronouncements of the EU Commission for competition policy against the use of merger control for protectionist purposes as well as their commitment to ensure merger control is not misused to pursue nationalistic or protectionist goals,<sup>160</sup> this indicates that the EUMR has an avowed and expressed anti-protectionist policy.<sup>161</sup>

One significant provision of the EUMR that is often linked to protectionism is Article 21, which can be characterised as a double-edged sword. Although it is a powerful tool against the threat of protectionism, it is a loophole that presents an opportunity to be exploited for protectionist ends. Under Article 21(4), Member States retain the right to take appropriate measures to protect legitimate interests other than those taken into consideration by the regulation or those compatible with the general principles and other provisions of community law.<sup>162</sup> This recognizes that Member States may have 'legitimate interest' in investigating a merger beyond harm to competition.<sup>163</sup> This provision creates a gap in the law that Member States can exploit to pursue protectionist ends. Significant government interventions on the ground of 'legitimate interest' on merger cases<sup>164</sup> illustrate attempts by Member States to use merger regulation to pursue protectionism. This is in line with the political economic perspective that politics is represented by the State as a sovereign political unit.

Even though Article 21 EUMR appears to be a powerful tool to prevent Member States from interfering with

cross-border transactions in theory, the Commission's record of its enforcement appears unsatisfactory.<sup>165</sup> The Commission has never managed to overturn a member State's opposition to a merger; at most, the Commission's intervention facilitated negotiations between the concerned authorities and the acquirer.<sup>166</sup> It is also noted that in some of the cases such as that of the Italian Banks,<sup>167</sup> *E.ON/Endesa and Abertis/Autostrade*, the Commission seemed ineffective in the face of Member States' inaction which led to lasting uncertainties for companies and, in most cases, the cancellation of merger plans.<sup>168</sup> In addition, Article 21 requires that the thresholds set by EUMR are met; hence, the creation of national champions which achieve most of their turnover within one and the same Member State do not fall within the jurisdiction of the Commission because of the application of the two thirds rule.<sup>169</sup> Lastly, while Article 21 may be considered a tool against protectionism by the Member States, it is worth noting that the EU itself might be protectionist against non-EU States.

Another issue with the EUMR is that too much discretion is granted to the Commission. The Commission is granted exclusive powers to assess concentration operations with a community dimension which relates to combined aggregate turnover. The discretionary power granted to the Commission can be subjected to political pressures and discretionary bias, which may lead the Commission to pursue non-competition goals such as protectionism. This supports the proposition of political realism that power is the end of political action, whether in the domestic realm or international arena. A study found that, both before and after the reform of EU merger regulation,<sup>170</sup> based on its wide power, the Commission's decision rule included both competition and non-competition variables. The Commission's interpretation of 'effective competition' extends beyond the competitive effects of mergers on consumer welfare and certainly includes industrial policy motives.<sup>171</sup> However, protectionist motives have not been established as the impact of nationality of the merging firms on the merger decision appears insignificant.<sup>172</sup> This approach, however, is inaccurate because of its binary representation of merger decisions – either blocked or allowed. Hence, it fails to capture the underlying protectionist motives in allowing mergers where there is a discriminatory merger fix imposed. Protectionist motives on merger regulation enforcement may be clearer in the cases' decisions.

The EU is often accused of protectionism because of its opposition to certain mergers which have been cleared by several competition authorities such as the cases of *Boeing/McDonnell Douglas*<sup>173</sup> and *GE/Honeywell*.<sup>174</sup> The EU is accused of discriminating against foreign firms to protect or promote its domestic firms. The *Boeing/McDonnell-Douglas* saga focused on a proposed merger between two American airline

manufacturers which wanted to establish the world's largest aerospace company.<sup>175</sup> The American Federal Trade Commission duly approved the merger, but it was opposed by the EU Commission. The Commission blocked the merger primarily because Boeing would strengthen its dominant position and because of the merger's potential exclusionary effect on Airbus, its competitor, as a result of Boeing's intention for all purchasers of Boeing aircraft to sign 20-year exclusivity deals.<sup>176</sup> The US suspected that the Commission's criticism of the merger had more to do with general industrial policy fears and an impulse to protect Airbus, so it regarded the European hostility to this venture as little more than knee-jerk protectionism.<sup>177</sup> Just as the realists subscribe, States enrich their power and wealth at the expense of their neighbouring States to obtain political and economic security. Nevertheless, because Boeing made concessions and changed its proposed transaction in order to comply with the Commission's antitrust policies, the Commission ultimately did not block the merger and the crisis was averted.<sup>178</sup> This suggests that the international area/scene is inherently unstable. With regard to *GE/Honeywell*, Schmitz argues that the Commission's decision reflects the EU competition law's goal to protect small and medium enterprises from dominant competitors which is traceable from its ordoliberal underpinnings.<sup>179</sup> The protection of small and medium enterprises may be subsumed under the infant industry argument in favour of protectionism.<sup>180</sup> However, the proposed *Siemens-Alstom* merger that was prohibited is a lucid manifestation of long-established frustrations with underlying asymmetries in the Merger Regulation. This which obstructs the dominance of the European industry within the global arena rather than the decision of the Commission, as being claimed on its protection of SME internally.<sup>181</sup>

**(ii) Competition law and protectionist policy: analysing export cartel from EU perspective**

Cartels in general are governed by Article 101 of the TFEU which prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'.<sup>182</sup> The EU adheres to the effects doctrine when prosecuting anticompetitive behaviour, i.e. when the conduct has a significant effect on the internal market.<sup>183</sup> In the case of export cartels, Article 101 will not apply because there is no effect on trade between the Member States, nor will competition within the common market be prevented, restricted or distorted. Generally, a scheme of exemptions is not necessary when cartels are only prohibited after the application of an effects test of some kind.<sup>184</sup> The EU, including through the decisions of

its courts, has implicitly exempted export cartels from its competition law. This amounts to protectionism because the EU in effect condones or allows the anti-competitive behaviour of its domestic firms which has an adverse effect on other states. This 'tolerance' amounts to a beggar-thy-neighbour policy which is inherently protectionist.<sup>185</sup> This is in line with the prescription of legal and political realism; the legal realist is attached to social reform and expects laws to serve as an instrument for social action by emphasising the interrelationship between legal rules and policy objectives.

As a result of the implicit nature of exemptions of export cartel by the EU, export cartels are not required to notify the Commission or register, nor are they supervised or regulated in any manner.<sup>186</sup> This insufficient information fails to establish the real economic effects of export cartels within the EU.<sup>187</sup> Furthermore, sanctioning an export cartel headquartered in the EU would require an extraterritorial application of competition law by the importing State.<sup>188</sup>

## 4.2 THE US ANALYSIS

**(i) Competition law and protectionist policy:**

*analysing merger regulation from a US perspective*

Similarly as in the EU, the laws governing merger regulation do not expressly pursue protectionism. The US merger regulation is primarily governed by section 7 of the Clayton Act<sup>189</sup> which prohibits concentrations that substantially lessen competition or tend to create a monopoly. The Sherman Act may also substantially govern mergers by prohibiting restrictive agreements<sup>190</sup> and monopolies.<sup>191</sup> US merger regulation, unlike the EU, has not faced protectionist accusations until recently. During the *Boeing/McDonnell Douglas* saga, the EU accused the US of promoting national champions by clearing the merger of two US companies. Recently, the US also faced accusations of protectionism from China when the Trump administration openly opposed what would have been the biggest tech merger in history between Broadcom and Qualcomm for national security reasons;<sup>192</sup> Qualcomm is a leading US company in the telecommunications sector whilst Broadcom is an Asian firm with ties to China.<sup>193</sup> It is believed that the US was motivated to block the potential merger because the deal would have allowed Asia to overtake the US in the race for global dominance in telecommunications.<sup>194</sup> This clearly projects the realist view that, to obtain political gain and security, States enrich their power and wealth at the expense of other States. Furthermore, the opposition is pursuant to the protectionist policy of the Trump administration, which also imposed tariffs on steel and aluminium on grounds of national security.<sup>195</sup> Although these tariffs preceded the potential merger, and it is too early to determine if the merger regulation will indeed be used to pursue protectionist ends in the US.

The *Broadcom/Qualcomm* situation shows how political intervention and protectionist motives can influence decision makers in regulatory approvals.

*(ii) Competition law and protectionist policy: analysing export cartel from a US perspective*

The US generally treats cartels as unlawful regardless of any proof of adverse effects.<sup>196</sup> Hence, it was imperative for the US to create explicit exemptions to export cartels through the Webb-Pomerene Act of 1918 and subsequently through both the Foreign Trade Antitrust Improvements Act of 1982 and Export Trading Company Act of 1982.<sup>197</sup> On the basis of these laws, export cartels are exempted provided that they do not have substantial effects on American internal or external commerce.<sup>198</sup> Just like the EU, the US does not prosecute export cartels since they are exempted from their jurisdictions as long as they do not affect competition within the domestic State. Nonetheless, the anticompetitive effects of export cartels are 'externalised' and the adverse impacts are felt by the States where the export cartels operate. Firms participating in export cartels achieve the status of monopoly and earn high profits at the expense of consumers (in the foreign States). In this sense, there is a maximisation of interests in agreement with the realist perspective; by expressly allowing export cartels despite knowledge of the welfare effects of cartels in the areas in which they operate, the US strengthens their export position to the detriment of foreign States, thus engaging in protectionism.

#### 4.3 COMPARATIVE ANALYSIS OF EU AND US COMPETITION LAW AND PROTECTIONIST POLICY

According to Dabbah, there are two ways in which States can utilise competition law to impair free trade and restrict access of foreign firms to domestic markets. One is the exemption under national competition law, and the other is the strategic application of domestic competition law.<sup>199</sup> For example, the export cartel exemption by the EU and the US illustrates the first exemption, while alleged discriminatory and selective enforcement of merger regulation by the EU and the US fit the second mode. In this context, both the EU and the US seem to be guilty of using competition law as tools for protectionism.

However, neither the EU nor the US will openly admit to such an allegation. An examination of the laws governing mergers and export cartels revealed that, at least textually, merger regulation and treatment of export cartels of both countries are founded on the adherence to free trade and trade liberalisation. The foundation of free trade and trade liberalisation can be traced to David Ricardo's theory on comparative advantage.<sup>200</sup> Under the supply and demand analysis of the neoclassical economics model, free trade results in lower production cost and better quality of products

for consumers.<sup>201</sup> The repeated mentioning of the phrases like 'protection or maintenance of competition in markets' or 'ensuring competition is not distorted' in the texts of the competition laws of the EU and the US is clearly evident of both States' adherence to the liberal perspective. In connection to the international political economy approach, liberals give primacy to the individual consumer, firm or entrepreneur and view individuals as having inalienable rights that must be protected from collectivises such as the State.<sup>202</sup> Therefore, in relation to competition law, the enforcement will be limited to the correction of market failures, and individuals and firms are mostly left alone with limited State regulation. In export cartel exemption, the EU appears to be more liberal than the US in the sense that the EU excludes export cartels from its jurisdiction as long as they do not have any effect in the internal market. The US, on the other hand, regulates the export cartels by requiring them to register. Although both the EU and US intervene in mergers, they remain liberal States in the sense that they only intervene upon notification and breach of certain specified thresholds.

Suspensions of protectionism mainly arise as a result of conflicting merger decisions. Accusations regarding the use of merger regulation for protectionist ends are stronger in the EU compared to the US. However, Fox argues that the EU is not necessarily protectionist; instead, the difference between the merger decisions of the EU and the US stems from the divergence of the goals pursued by the competition policy of each jurisdiction.<sup>203</sup> The US antitrust goal is centred on consumer welfare whereas the EU competition goal aims to protect competitive processes. While both adhere to (liberal theoretical underpinning of) international political economy, the EU and the US differ in their priorities. The US champions consumer welfare alone, while the EU considers other goals such as competition in the internal market as well as overall welfare. The EUMR considers not only the effect on consumer welfare of the proposed merger but also its potential exclusionary effect.<sup>204</sup> More aptly, the EU is inclined to oppose a merger if it is aimed at creating or strengthening a position that will facilitate an abuse of dominance and exclude competitors.<sup>205</sup> Although Anderson et al. admit the certainty of involvement of the political element on merger decisions, they support Fox's argument that the EU is not necessarily protectionist and propose three reasons for the divergence in views on mergers.<sup>206</sup> First, competition authorities apply different rules of substantive analysis in merger assessment. Second, each jurisdiction has a unique market situation and conditions of competition. Third, competition authorities simply reach different conclusions based on the facts and evidence available to them. In the case of the US and the EU, while there are no substantial differences in merger regulation, each jurisdiction utilises different evaluation criteria



and prioritizes different aspects of competition law.<sup>207</sup> Consistently, empirical studies support this finding and have rebutted the protectionist hypothesis, at least in the EU context such as with the EU's selective enforcement of its merger regulation to protect domestic firms.<sup>208</sup>

Nevertheless, the analysis of laws involving merger regulation and previous merger decisions revealed that the political element and industrial policy motivations, whether protectionist or not, are evident in both the EU and the US. Despite the lack of direct evidence to prove the use of merger regulation for protectionist ends, the likelihood is significantly high; this is especially clear in the case of the pre-emptive blocking of the potential *Broadcom/Qualcomm* merger under the Trump administration which had an open protectionist or nationalist stance in line with the prescriptions of legal/political realist theory.

In the case of export cartels, the absence of export cartel prosecutions serves as an impediment in completely determining whether export cartel exemptions serve protectionist ends. However, this article has found that both the EU and the US exempt export cartels from their competition law. Economic analysis suggests that export cartels decrease supply and increase prices.<sup>209</sup> Export cartels that lead to monopolies also create a dead-weight loss to the overall welfare. In addition to the economic or quantifiable effects, export cartels may also lead to qualitative effects such as food shortages, a rise in tensions between States and retaliatory acts from trading partners.<sup>210</sup> Therefore, at least theoretically, as expressly argued in the case study of the US and implied in the case study of the EU, the tolerance of export cartel operations in foreign States amounts to beggar-thy-neighbour policies. These are inherently protectionist or mercantilist because they serve to strengthen the export position of the EU and the US at the expense or detriment of the importing jurisdictions. From the international political economy perspective, export cartel exemptions of the EU and the US lean towards realist theoretical underpinnings. Realists place the primacy on politics and believe that the economy is a creation of the State.<sup>211</sup> Mercantilism refers to when states, under the realists' perspective, aim to increase their national power at the expense of other states and consumers.<sup>212</sup> Some concepts supported by mercantilism include the promotion and protection of national industries, national security or strategic trade theory. Hence, mercantilist arguments ultimately aim to increase exports, improve balance of payments and accumulate national wealth with realist intentions.<sup>213</sup>

## SECTION 5: CONCLUSION

This article examines how the EU and the US use their competition law, particularly regarding merger regulation

and export cartels, for protectionist ends.

In the context of academic literature, the article identifies the goals and underlying motivations of competition policy and trade policy. Competition law primarily rests on two schools of thought – the Chicago School and the Harvard School, which is reflected on its enforcement, e.g. whether it is welfare-centred or structure-centred, respectively. Scholarly works establish the arguments in favour of protectionism such as national defence, protection of infant industry and strategic trade theory. The relevant concepts and principles in the article, which have been identified by scholars as mergers, export cartels, competition law, protectionism and trade policy, were conceptualised for clearer familiarisation and understanding.

It is suggested that concerns regarding the link between competition policy and trade policy have been around since the pre-GATT period. There have also been attempts to integrate the competition policy with the WTO framework. Nonetheless, studies linking competition law and protectionism remained scant. While the protectionist tendencies of EU merger regulation enforcement have been explored empirically, little or nothing has been found in the US context. Furthermore, studies that relate export cartels to protectionism are mainly based on theoretical assumptions given the lack of empirical data to establish the economic effects of export cartels.

The analysis section discusses the link between merger regulation, export cartels and protectionism in the EU and the US perspectives as well as a comparative analysis between the two. The article finds a few similarities between the EU and US perspectives on competition law and trade policy nexus. First, both adhere to trade liberalisation goals, at least based on the text of their competition law and the foundations of both merger regulation and export cartel exemptions. Second, there is lack of direct evidence for both the EU and the US to establish the use of merger regulation for protectionist ends through discriminatory merger regulation enforcement; however, there is certainty of the political element in decision-making. Third, both grant wide discretion to competition authority, which opens opportunities for lobbying and promotion of special interests or other non-competition goals. Fourth, both exempt export cartels, which theoretically amounts to mercantilism. However, the EU and the US have diverging trade policies and aims for competition law. The US is consumer-welfare centred whereas the EU ensures undistorted competition in the internal market. The US under the Trump administration openly pursued protectionist policies while the EU is on the lookout for protectionist tendencies of its Member States.

This article finds that there have been calls for a unified approach to competition law or a single international competition law regime. However, it has been established



that competition law reflects varying goals, objectives, priorities, politics, culture, and environments of each enforcing jurisdiction. Hence, in the light of these findings, the article proffers creating a set of principles of competition policy, rather than a single competition law regime, that will align all competition laws and address the gap being exploited to pursue protectionist ends. A case in point is China, which has a growing competition law regime but is also suspected of using competition law for protectionism as in the merger case of *Coca-Cola v Huiyuan*.

In conclusion, this article examines how the EU and the US use merger regulation and export cartels to further protectionist aims. While there is an absence of direct evidence establishing the use of competition law as a tool for protectionist policies, there is also no evidence of the absence of protectionist motives in enforcing competition law. Hence, one can deduce only by conjecture that there is a significant likelihood of States utilising competition law for protectionism either through selective and discriminatory enforcement or exemption of anticompetitive practices from competition law. To illustrate, the European Commission proposed a 'new antitrust tool' (aimed at tackling foreign subsidies)<sup>214</sup> and the recent revisions to the UK merger rules to catch foreign acquisition of companies in sensitive or more viable sectors.<sup>215</sup>

The likelihood that States will use competition law as such becomes clear when considering the natural inclination of States to pursue protectionist policies under the realist theoretical underpinnings as well as the sponge nature of competition law. Therefore, in order to address this gap which neither competition law nor trade policy can address, States need to agree on unified underlying principles of competition law.

## NOTES

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- 11 In economics, the term beggar-thy-neighbour describes economic policies that aim to enrich one country at the expense of other countries. Most commonly, the term *beggar-thy-neighbour* is used in relation to such international trade policies as the application of tariffs and other restrictions on imports, as well as currency devaluations that are intended to improve the international competitiveness of the goods the country is exporting. 'Beggar-thy-neighbour', *International Encyclopedia of the Social Sciences* (2021) <<https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/beggar-thy-neighbor>> accessed 30 January 2021.
- 12 It should be noted that merger regulation and export cartel are just two ways of using competition law instrumentally; there are other ways such as the case of facilitation, special treatment or restrictive doctrine in commercial activities to own State-owned enterprise, and limiting the reach of own competition laws. See, for example, Marek Martyniszyn, 'Foreign State's Entanglement in Anticompetitive Conduct', (2017) 40[2] *World Competition* 299.
- 13 See for example, Brian-Vincent Ikejiaku, Consideration of Ethical and Legal Aspects of Corporate Social Responsibility: The Issue of Multi-National Corporations and Sustainable Development (2012) *Nordic Journal of Commercial Law* Issue 2012 No.1, 1-32.
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- 15 The US Department of Justice has authority to enforce the Sherman Act both civilly and criminally, and to enforce the Clayton Act civilly. The Federal Trade Commission has authority to investigate and civilly to prosecute the same conduct under 5 of FTC Act. The US system operates dual legislative and enforcement authority of the States and the Federal Government and private enforcement. *ibid.*
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## COMPETING INTERESTS

The authors have no competing interests to declare.

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